SUPREME COURT, STATE OF COLORADO

Case No. 93 SA 017

On Appeal from the District Court, City and County of Denver
H. Jeffrey Bayless, Judge; Case No. 92 CV 7223

BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION, THE COLORADO EDUCATION ASSOCIATION, AND THE ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, AND THE CITY COUNCIL OF ASPEN,

Plaintiffs-Appellees,

v.

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants-Appellants.

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Anderson, Family and Peer Relations of Gay Adolescents,
in 14 Adolescent Psychiatry: Developmental and
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A. Bell, M. Weinberg & S. Hammersmith, Sexual Preference
(1981).....5

Berrill, Anti-Gay Violence and Victimization in the
United States: An Overview, in Hate Crimes:
Confronting Violence Against Lesbians and Gay Men
19 (G. Herek & K. Berrill eds. 1992).....11

Borhek, Helping Gay and Lesbian Adolescents and Their
Families, 9 J. Adolescent Health Care 123 (1988).....10

Burr, Homosexuality and Biology, Atlantic Monthly,
March 1993, at 47.....5, 18

Cook, Who is Killing Whom? (Respect All Youth Project
of Fed'n of Parents & Friends of Lesbians & Gays,
Issue Paper 1, 1991).....6, 7

Dennis & Harlow, Gay Youth and the Right to Education,
4 Yale L. & Policy Rev. 446 (1986).....5, 11, 12, 18

A. Fricke, Reflections of a Rock Lobster: A Story About
Growing Up Gay (1981).....9

Gibson, Gay Male and Lesbian Youth Suicide,
Report of the Secretary's Task Force on Youth
Suicide 3-110 (U.S. Dep't of Health & Human
Services 1989).....10, 11, 13, 14

Gonsiorek, Mental Health Issues of Gay and Lesbian Adolescents, 9 J. Adolescent Health Care 114 (1988).....8

Groth & Birnbaum, Adult Sexual Orientation and Attraction to Underage Persons, 7 Archives Sexual Behav. 175 (1978).....18

Harrington, Growing Up Gay, Denver Post, June 4, 1992, at 1E 12, 13

Herek, Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research, 1 Law & Sexuality 133 (1991).....18

Hetrick & Martin, Developmental Issues and Their Resolution for Gay and Lesbian Adolescents, 14 J. Homosexuality 25 (1987).....7, 8, 10

Hunter, Violence Against Lesbian and Gay Male Youths, 5 J. Interpersonal Violence 295 (1990).....11

Hunter & Schaecher, Stresses on Lesbian and Gay Adolescents in Schools, 9 Social Work in Education 180 (1987).....5

Making Schools Safe for Gay and Lesbian Youth (The Governor's Commission on Gay and Lesbian Youth 1993).....17

Martin, Learning to Hide: The Socialization of the Gay Adolescent, in 10 Adolescent Psychiatry: Developmental and Clinical Studies 52 (S. Feinstein ed. 1982).....8, 9, 19

Murdoch, Gay Youths' Deadly Despair: High Rate of Suicide Attempts Tracked, Washington Post, Oct. 24, 1988, at A1.....13

Remafedi, Adolescent Homosexuality: Psychological and Medical Implications, 79 Pediatrics 331 (1987).....10

Remafedi, Male Homosexuality: The Adolescent's Perspective, 79 Pediatrics 326 (1987).....6

Remafedi, Farrow & Deisher, Risk Factors for Attempted Suicide in Gay and Bisexual Youth, 87 Pediatrics 869 (1991).....14

M. Saghir & E. Robins, Male and Female Homosexuality: A Comprehensive Investigation (1973).....5

Stevens, Help Is Scant for Gay Students: Area High Schools Offer Little Counsel, Denver Post, Dec. 2, 1990, at 1A.....19

Why CIBC Is Dealing With Homophobia, 14 Interracial Books for Children Bull., No. 3-4, 1983 4

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This brief amicus curiae is filed by the National Education Association ("NEA"), the Colorado Education Association ("CEA"), and the Association for Supervision and Curriculum Development ("ASCD") in support of plaintiffs-appellees, contingent on the

granting of the attached Motion for Leave to File Brief Amicus Curiae.

INTEREST OF AMICI CURIAE AND INTRODUCTION

NEA is a nationwide employee organization, with a current membership of some 2.1 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA operates through a network of affiliated organizations: it has as state affiliates an organization in each of the 50 states, and has approximately 12,000 local affiliates in individual school districts, colleges and universities throughout the United States. CEA is NEA's state affiliate in Colorado.

As set forth in the Preamble to its Constitution, the objectives of NEA are, inter alia, to "advance the cause of education for all individuals, promote the health and welfare of children and/or students . . . [and] promote and protect human and civil rights." CEA pursues similar objectives within the state of Colorado.

The Association for Supervision and Curriculum Development is an international nonpartisan association of over 160,000 educators who share the belief that all students can succeed in a challenging, well-planned educational program. ASCD is committed to its mission of developing leadership for quality in education for all students. ASCD condemns discrimination in any form and has adopted a resolution urging its members to work with other

organizations to eliminate discrimination against students because of their sexual orientation.

At issue in this case is the constitutionality of a proposed amendment to Article II of the Colorado Constitution that was approved by the electorate on November 3, 1992. This proposed amendment -- Amendment 2 -- provides as follows:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

On January 15, 1993, the District Court in and for the City and County of Denver, Hon. H. Jeffrey Bayless, concluded that plaintiffs "have a reasonable probability of proving that Amendment 2 is unconstitutional beyond a reasonable doubt." V. 7, p. 30. Accordingly, the District Court preliminarily enjoined defendants "from declaring Amendment 2 in force, and . . . from enforcing Amendment 2 until further order of Court." Id. This appeal was taken from that injunction.

Although amici strongly believe that Amendment 2 violates the First and Fourteenth Amendments to the United States Constitution, it is not the purpose of this brief to present the relevant constitutional arguments. Amici defer in this regard to appellees. As organizations concerned with the quality of public education,

amici file this brief in order to provide this Court with a perspective as to the impact of Amendment 2 that it might not otherwise receive. Specifically, we shall demonstrate why Amendment 2 significantly impairs the ability of Colorado's public schools to fulfill their educational mission.[1]

ARGUMENT

While there are no precise figures available as to the number of gay and lesbian students in the public schools,[2] it has been estimated that students will be found in almost every classroom who are (or will be) gay or lesbian. Why CIBC Is Dealing With Homophobia, 14 Interracial Books for Children Bull., No. 3-4, 1983, at 3. For present purposes, the precision of this estimate is less important than the general point that gay and lesbian students constitute a not insignificant segment of the total student population in the public schools.

In Part I below, we explain why the public schools must display particular concern for the gay and lesbian segment of the student population. In Part II, we demonstrate why Amendment 2

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[1]As used in this brief, the term "public schools" refers to elementary and secondary schools. This is not to suggest, however, that the analysis necessarily is limited to this universe. With appropriate adjustments for the maturity level of the individuals involved, much of the analysis would apply as well to students in public colleges and universities in Colorado.

[2]Amendment 2 refers to persons of "homosexual, lesbian or bisexual orientation." For purposes of simplicity in discussion, and to be consistent with the terminology used in much of the source material cited, we shall in this brief refer to the persons encompassed by Amendment 2 as "gay and lesbian."

undermines the ability of the public schools to meet the needs of these at-risk students (Part II(A)), and, indeed, to meet the schools' broader obligation to properly educate all students, including those who are not themselves gay or lesbian (Part II(B)).

I. THE SPECIAL NEEDS OF GAY AND LESBIAN STUDENTS

It is not known with certainly why some people develop a homosexual and others a heterosexual orientation. Recent research suggests, however, that to a large extent -- perhaps as much as 70 percent -- the answer may be genetic. Burr, Homosexuality and Biology, Atlantic Monthly, March 1993, at 47, 64 (reporting twin studies of Michael Bailey and Richard Pillard). Whatever additional environmental and biological factors may contribute to the establishment of a person's sexual orientation, it is believed that they are present, at the latest, early in the life of a child, id., and that sexual orientation becomes fixed before puberty, quite possibly by the age of five or six. Hunter & Schaecher, Stresses on Lesbian and Gay Adolescents in Schools, 9 Social Work in Education 180, 181 (1987); Dennis & Harlow, Gay Youth and the Right to Education, 4 Yale L. & Policy Rev. 446, 465 (1986). Many gays and lesbians recall being "different" from their peers during childhood, e.g., by displaying atypical gender roles. M. Saghir & E. Robins, Male and Female Homosexuality: A Comprehensive Investigation, 18-21, 192-94 (1973); A. Bell, M. Weinberg & S. Hammersmith, Sexual Preference 188-89 (1981). In many, if not most, cases, gays and lesbians develop an awareness of their

attraction to the same sex during early adolescence, often by the age of fourteen. Anderson, Family and Peer Relations of Gay Adolescents, in 14 Adolescent Psychiatry: Developmental and Clinical Studies 162, 165 (S. Feinstein ed. 1987); Remafedi, Male Homosexuality: The Adolescent's Perspective, 79 Pediatrics 326, 330 (1987).

Thus, numerous public school students are struggling to cope with the realization of their homosexual identity -- in the face of a society that is almost uniformly hostile to gays and lesbians. These students are at high risk for serious psychosocial problems -- not because they are gay or lesbian, but because of the prejudice and rejection they encounter around them.

Indeed, long before the time gay and lesbian youth become aware of their sexual orientation, they have internalized society's condemnation of them:

> Even before they reach the kindergarten playground, they learn nasty words for homosexuals. The few lesbian or gay people they have seen in movies and on television often die by suicide, homicide, or AIDS, creating disastrous expectations. Moreover, young people generally assume that all the people they know are heterosexual; they have no idea that some of the healthy, respected adults around them are lesbian or gay.

Cook, Who is Killing Whom? 1 (Respect All Youth Project of Fed'n of Parents & Friends of Lesbians & Gays, Issue Paper 1, 1991).

The problem is particularly acute because gay and lesbian youth usually discover their sexual orientation in complete isolation; at the time of their greatest anxiety they typically have no access to peer or support groups. Gay and lesbian youth

are in this regard generally distinguishable from members of most other stigmatized minority groups:

> Most individuals within other stigmatized groups, such as African Americans, grow up in families whose members have personally experienced discrimination. Such families have developed ways to support each other and to teach children -- virtually from infancy -- how to cope. Lesbian and gay youth, on the other hand, usually have no such family and community backup; indeed, their families often mirror the larger society's hostility.

Id. at 2. While "Blacks, Jews, and Hispanics are not thrown out of their families or religions at adolescence for being black, Jewish, or Hispanic[,] homosexual adolescents are." Hetrick & Martin, Developmental Issues and Their Resolution for Gay and Lesbian Adolescents, 14 J. Homosexuality 25, 29 (1987).

In addition, gay and lesbian youth lack access to accurate information about homosexuality and thus "often demonstrate an appalling ignorance of what it means to be homosexual, reflecting the basest stereotypes about homosexual people and therefore about themselves." Id. at 32.[3]

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[3]Because of the societal stigma associated with homosexuality,

> [h]omosexually oriented teachers, clergymen, and physicians must hide their sexual identity. Aside from the effect on the professionals involved, this discrimination effectively denies suitable role models who can demonstrate to the gay adolescent by example, sharing, and teaching that the prejudices of society are false and that homosexuality does not automatically mean depravity, criminality, and degeneracy. Heterosexual adolescents have a multitude of role models for all possible social identities which may touch on their sexual orientation, but homosexual adolescents have no constructive models and indeed are led to believe that their sexual identity precludes other roles.

The result of this "internalized homophobia," Gonsiorek, Mental Health Issues of Gay and Lesbian Adolescents, 9 J. Adolescent Health Care 114, 117-19 (1988), is a sense of social isolation and moral worthlessness, ranging from a tendency toward self-doubt to overt self-hatred. Thus, "[m]ost gay adolescents can vividly recall the intense anxiety they experienced when they first discovered that they suddenly belonged to this group of people that is so vehemently despised by most others. The industriousness they mastered in childhood, the positive self-regard they may have developed, and the dreams for a happy and productive future seem to be dashed almost as soon as they enter the awareness of the gay adolescent." Anderson, supra, at 173.[4]

The realization of his or her homosexual identity often has serious consequences for the gay or lesbian youth's relationship with his or her family:

> Realizing that if one's parents knew the truth, they would find one utterly contemptible, is frightening to the adolescent. It is not surprising that most of these adolescents feared that they would be rejected, punished, perhaps physically assaulted, or expelled from the family. The gay adolescent consciously and unconsciously defends against these fears by a variety of maneuvers that have in common an effect of distancing the child from the family.

Martin, Learning to Hide: The Socialization of the Gay Adolescent, in 10 Adolescent Psychiatry: Developmental and Clinical Studies 52, 55 (S. Feinstein ed. 1982).

[4]Hetrick and Martin report that the following is a common question in calls to a telephone counseling service for gay teenagers: "Does this mean I have to be a hairdresser or something like that?" Hetrick & Martin, supra, at 32.

Id. at 165. Most often, such adolescents initially adopt a strategy of attempting to hide their sexual orientation:

> [T]he rewards for being normal are so great that those who can pass will. . . . This strategy of deception distorts almost all relationships the adolescent may attempt to develop or maintain and creates an increasing sense of isolation. The adolescent realizes that his or her membership in the approved group, whether it be the team, the church, the classroom, or the family, is based on a lie. This reinforces the belief that one is not truly a member of the group, even while membership within it is maintained.

Martin, Learning to Hide: The Socialization of the Gay Adolescent, in 10 Adolescent Psychiatry: Developmental and Clinical Studies 52, 58-59 (S. Feinstein ed. 1982).[5]

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[5]One gay male describes his efforts to hide his identity while a student in these terms:

> I began to believe that everyone looked down on me and when anyone looked at me I thought I saw their seething hatred of me coming through. When I entered high school I was completely isolated from the world. I had lost all concept of humanity; I had given up all hopes of ever finding love, warmth or tenderness in the world. I did not lie to myself, but I did my best to keep other people from thinking I was homosexual. For the most part I succeeded. I could . . . refuse to ever mention my real feelings. That way, I would never again suffer the consequences of being the individual I was. I retreated into my own world. . . .
>
> [T]he only goal left to me in life was to hide anything that could identify me as gay. I became neurotic about this. . . . Self-doubt set in. I thought that anything I did might somehow reveal my homosexuality, and my morale sank even deeper. The more I tried to safeguard myself from the outside world the more vulnerable I felt. I withdrew from everyone and slowly formed a shell around myself.

A. Fricke, Reflections of a Rock Lobster: A Story About Growing Up Gay 31-32 (1981) (paragraph structure altered).

If, on the other hand, gay and lesbian youth are open about their sexual identity, "they may feel some sense of security within themselves but face tremendous external conflicts with family and peers." Gibson, Gay Male and Lesbian Youth Suicide, Report of the Secretary's Task Force on Youth Suicide 3-110, 3-117 (U.S. Dep't of Health & Human Services 1989). See generally Borhek, Helping Gay and Lesbian Adolescents and Their Families, 9 J. Adolescent Health Care 123 (1988). The inability of parents to reconcile a child's homosexual identity with their own attitudes and values frequently results in the child whose sexual orientation is (voluntarily or involuntarily) disclosed being forced to leave home.[6] One study of gay male adolescents found that nearly half of the subjects had left their home at least once. Remafedi, Adolescent Homosexuality: Psychosocial and Medical Implications, 79 Pediatrics 331, 332 (1987). Most often, those who leave home are "pushaways" or "throwaways" rather than running away of their own volition. Gibson, supra, at 3-112. Of those forced to leave their homes, many end up on the street, frequently turning to prostitution and drugs. By one estimate, as many as 25 percent of all young people living on the streets are gay, lesbian, bisexual and transsexual youth. Id. at 3-114.

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[6]Hetrick and Martin relate that in counseling gay and lesbian teenagers "we strongly recommend to clients who are still in high school that they think very carefully before coming out to their parents. We have seen several instances where a young person, confident of the love of his or her parents, reveals his or her homosexuality and then ends up on the street." Hetrick & Martin, supra, at 35.

All too often, the public schools do little to help gay and lesbian students deal with their sexual identity. Indeed, the schools are often a large part of the problem such students face. As one commentator puts it, "[n]owhere are the[] harshly negative attitudes towards homosexuality more pronounced than in junior high and high school. These institutions are the brutal training grounds where traditional social roles are rigidly reinforced." Id. at 3-117.

Thus, for many gay and lesbian students, school means "ridicule from teachers, violent harassment from fellow students, and refusals from administrators to punish verbal and physical attacks upon them." Dennis & Harlow, supra, at 446. Forty-five percent of gay males and nearly 20 percent of lesbians report having experienced verbal abuse or physical assault in secondary schools. Gibson, supra, at 3-112; see also Berrill, Anti-Gay Violence and Victimization in the United States: An Overview, in Hate Crimes: Confronting Violence Against Lesbians and Gay Men 19, 34 (G. Herek & K. Berrill eds. 1992); Hunter, Violence Against Lesbian and Gay Male Youths, 5 J. Interpersonal Violence 295 (1990). "The shame of ridicule and fear of attack makes school a fearful place to go, resulting in frequent absences and sometimes academic failure." Gibson, supra, at 3-112 to 3-113. One researcher reports that 28 percent of the gay students he studied dropped out of school. Id. at 3-113.[7] For those who remain, the

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[7]Dennis and Harlow report one incident in which a physical education teacher ridiculed a gay student for months and finally

discriminatory atmosphere in many schools "forces gay students to concentrate on survival rather than education and destroys gay teenagers' self-esteem during a crucial developmental period." Dennis & Harlow, supra, at 448.[8]

As a result of the above, many gay and lesbian students experience low self-esteem, identity conflicts, social isolation, academic inhibition, truancy, substance abuse, depression, suicidal

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compelled him to attend girls' gym class. When the principal failed to take any remedial action the boy dropped out of school. In another case, a high school principal, in an opening-day speech to students, expressed relief that the school's sole openly gay student would not be returning for his senior year; the boy had quit school after taunting from teachers and students when he had "come out" the previous year. Dennis & Harlow, supra, at 448-49.

[8]Colorado is, of course, not immune from this pattern. A recent Denver Post article reported the high school experience of one Denver-area teenager in these terms:

> At the door, his heart starts racing and his hands sweat. He feels like running away, but he keeps going. If it were just the words, he could handle it. He hasn't had a day in high school without them. Faggot. Queer. Gay. It goes on and on, all day long. Lez. Dyke. Homo. He didn't always feel so different from everyone else, but now he does. He's gay. He listens to the words all day long.
>
> He's been openly gay -- "out" -- since he was 14 and now he's big, big enough to be a football player, but he's "a queer" instead. He's strong enough to take care of himself, so unless they shoot him or jump him in the alley, he's OK. Maybe. He knows the teachers are talking about him. He feels alone. He's never sure anyone would stand up for him.
>
> It's a day in the life of a gay teen, yet their stories will never make it to the pages of the school newspaper or the yearbook. High school won't be the best years of their lives, but instead, say the gay teenagers, years of terror.

Harrington, Growing Up Gay, Denver Post, June 4, 1992, at 1E (paragraph structure altered).

ideation, and alienation from family and peer groups. Anderson, supra, at 176. Often these psychosocial problems are transient, id., but that is not always the case. Sometimes they are fatal. According to the Secretary of Health and Human Services' Task Force on Youth Suicide, suicide is the leading cause of death among gay and lesbian youth. Gibson, supra, at 3-110. Indeed, gay and lesbian youth are two to three times more likely to attempt suicide than other young people, and completed suicides by this group constitute up to 30 percent of all youth suicides. Id. In many cases, parents have found out that their children were gay or lesbian from suicide attempts. Murdoch, Gay Youths' Deadly Despair: High Rate of Suicide Attempts Tracked, Washington Post, Oct. 24, 1988, at A1. See also Harrington, Growing Up Gay, Denver Post, June 4, 1992, at 1E, 3E (describing meeting of a gay and lesbian youth support group, at which "[n]early everyone in the room ha[d] attempted suicide").[9] It is particularly instructive to

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[9]Too often, the schools' failure to provide gay and lesbian students with a secure environment plays a central role in such tragedies, as is vividly illustrated by the following anecdote from the report of the Secretary's Task Force on Youth Suicide:

> In Lebanon, Pennsylvania in 1977, a 16-year old boy fatally shot himself before entering the 10th grade. He left a suicide note explaining he could not return to school and sustain the abuse and ridicule about being gay from his classmates. A few friends at school supported (him) though they knew he was gay, but the majority ridiculed him without mercy. He skipped classes to avoid the torture and welcomed the summer vacation as a respite. But he was already taking pills to escape the reality of the approach of another school term, when he would have to move from junior high to the even more sharply defined roles of senior high. On September 3 he

note the results of one study, according to which one-third of the gay and lesbian youth who had attempted suicide made their first attempt in the same year in which they came to identify themselves as homosexual. Remafedi, Farrow & Deisher, Risk Factors for Attempted Suicide in Gay and Bisexual Youth, 87 Pediatrics 869, 873 (1991).

There is no need to belabor the point. It is clear that the public schools must display particular concern for gay and lesbian students. To meet this obligation, the schools must, at the very least, provide an environment in which these at-risk students can feel sufficiently secure, so that they can devote their energies to learning rather than to survival. The schools must, in addition, teach other students who are not themselves gay or lesbian the broader lesson of tolerance: that regardless of race, sex, religion, ethnic origin, disability, or any other distinguishing characteristic -- such as sexual orientation -- all people should be judged according to their individual merit rather than on the basis of invidious stereotypes. In Part II, we explain why Amendment 2 undermines the ability of the public schools to perform both of these functions.

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shared that anxiety with a friend and on September 5 he shot and killed himself.

Gibson, supra, at 3-128.

II. AMENDMENT 2 UNDERMINES THE ABILITY OF THE PUBLIC SCHOOLS TO MEET THE NEEDS OF GAY AND LESBIAN STUDENTS AND TO TEACH ALL STUDENTS THE BROADER LESSON OF TOLERANCE

A. In order to meet the needs of gay and lesbian students, school districts must, at the very least, create an environment in which these students can feel physically and emotionally secure. As a first step toward this end, it is essential that school districts be able to prohibit discrimination on the basis of sexual orientation. In June 1992, plaintiff/appellee Boulder Valley School District RE-2 adopted a policy that prohibits discrimination on the basis of race, color, creed, marital status, national origin, gender, disability or sexual orientation, together with a grievance procedure through which students may seek recourse for violations of the policy. Amendment 2 would prevent implementation of this policy, insofar as discrimination on the basis of sexual orientation is concerned. By the same token, other school districts that, like Boulder Valley School District RE-2, wished to express their commitment to the creation of an environment that is conducive to learning for all students -- including gay and lesbian students -- would be prevented from doing so by Amendment 2.

The adoption of such nondiscrimination policies is important not only because these policies provide gay and lesbian students a means of recourse when their rights to a secure environment and equal treatment are violated. Perhaps more important is the signal such policies send -- that gay and lesbian students have a place in

society, and that harassment, violence, and other forms of discrimination will not be permitted.[10]

Another pernicious effect of Amendment 2 is to chill the efforts of school districts to meet the needs of gay and lesbian students. For example, amicus NEA conducts inservice training programs on "Affording Equal Opportunity to Gay and Lesbian Students Through Teaching and Counseling." These programs are designed to develop teachers' sensitivity to the needs of gay and lesbian students and to enhance teachers' ability to meet those needs. While programs of this type by NEA and other private entities would not per se be prohibited by Amendment 2, the Amendment might prevent school districts from funding teacher participation in these programs, and from themselves providing such inservice training.[11] Moreover, NEA policy urges school districts to "provide counseling by trained personnel for students who are struggling with their sexual/gender orientation." NEA Handbook 1992-1993, at 263 (Resolution C-26). Such efforts by school districts to meet the needs of gay and lesbian students and to insure them equal opportunity within the public education system

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[10]Thus, it is at most a partial answer to say, as do defendants-appellants, that other remedies may remain in existence for certain types of anti-gay and lesbian actions. Opening Brief for Defendants-Appellants at 17.

[11]By way of example, the Denver School District in 1989 offered teachers inservice training programs on dealing with the problems of gay and lesbian youth.

would be contrary to the spirit, if not the letter, of Amendment 2.[12]

As was discussed above, one of the reasons for despair among adolescents newly discovering their homosexual identity is the perception that they are now part of a despised minority, and have no prospect of success and happiness in their personal or professional lives. A powerful antidote to such despair can come from gay and lesbian teachers, who can by their very presence give hope to the confused adolescent -- and who can provide understanding and knowledgeable counselors to whom these students can turn. But when these teachers reveal their sexual orientation they may -- in the absence of a policy outlawing employment discrimination on the basis of sexual orientation -- make themselves vulnerable to dismissal.[13]

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[12]The importance of public school programs addressing the needs of gay and lesbian students has been highlighted by the recent report of the Massachusetts Governor's Commission on Gay and Lesbian Youth. Appointed by Governor William Weld as a result of concern over the high suicide rate among gay and lesbian youth and the other serious problems facing these young people, the Commission issued its report in February 1993. Among its recommendations, the Commission urged the schools to establish policies protecting gay and lesbian students from harassment, violence, and discrimination; train teachers and counselors in suicide and violence intervention; establish support groups for gay and lesbian and "straight" students; include in school libraries information for gay and lesbian students; integrate discussion of gay and lesbian issues into the curriculum; and provide counseling for the families of gay and lesbian adolescents. Making Schools Safe for Gay and Lesbian Youth 2 (The Governor's Commission on Gay and Lesbian Youth 1993).

[13]Some anti-gay organizations object to the presence in the classroom of gay and lesbian teachers because they contend that it leads to the "recruitment" of students to homosexuality. Such arguments wholly ignore the overwhelming evidence that one's sexual orientation is established by a very early age and is, thereafter,

A case in point is Gaylord v. Tacoma School Dist. No. 10, 559 P.2d 1340 (Wash.), cert. denied, 434 U.S. 879 (1977), in which a Washington state high school teacher -- who had counseled a student troubled about his own sexual identity -- was dismissed when the teacher's homosexuality became publicly known. The ground for the discharge, which was upheld by the Washington Supreme Court, was the expansive charge of "immorality" -- which also constitutes a ground for dismissal under Colorado's Teacher Employment, Compensation, and Dismissal Act. See § 22-63-301, C.R.S. Quite apart from the question of employment discrimination, such discharges of openly gay and lesbian teachers reinforce the stigma felt by gay and lesbian students. Dennis & Harlow, supra, at 473.

Even prior to Amendment 2, and following enactment of Denver's ordinance barring employment discrimination based on sexual

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highly resistant to change. See Burr, supra; Herek, Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research, 1 Law & Sexuality 133, 148-52 (1991); Dennis & Harlow, supra, at 465. Furthermore, research on parents -- the type of role model most likely to be influential -- has failed to find any evidence that children of gay or lesbian parents are less well adjusted or any different in their development of gender identity and sexual orientation than the children of heterosexual parents. Herek, supra, at 157-61.

A second argument against the presence of gay men in the classroom is the contention that they are more likely than heterosexual men to molest children. This myth is similarly without foundation in fact. See id. at 152-56. It appears to rest in large part on the inaccurate assumption that males who molest male children are homosexual with respect to their adult sexual orientation. In fact, many child molesters have never developed the capacity for mature sexual relations with other adults, either men or women; and those who have are no more likely to have a homosexual than a heterosexual orientation. Id. at 153-55; Groth & Birnbaum, Adult Sexual Orientation and Attraction to Underage Persons, 7 Archives Sexual Behav. 175, 176-77 (1978).

orientation, gay and lesbian teachers in Denver were reported to be insecure about the extent to which they could, without fear or reprisal, counsel gay students. Stevens, Help Is Scant for Gay Students: Area High Schools Offer Little Counsel, Denver Post, Dec. 2, 1990, at 1A. Without the protection of policies that prohibit employment discrimination on the basis of sexual orientation -- which are precluded by Amendment 2 -- it is even less likely that gay and lesbian teachers will take the risk of counseling those of their students who badly need such support.

B. Not only does Amendment 2 undermine the ability of the public schools to meet the special needs of gay and lesbian students, but it impacts more broadly on the educational mission of the public schools. In raising discrimination against those perceived as different to the level of high constitutional principle, Amendment 2 calls into question one of the most important values the schools attempt to teach their students -- tolerance and respect for those who are different. As one observer has noted, homophobia is "similar in nature and dynamic to all other prejudices including anti-Semitism, racism, and sexism." Martin, supra, at 52. If it is now a constitutional principle that invidious discrimination on the basis of fears and prejudices about homosexuality is reasonable, acceptable, and legal behavior, then it is difficult to see how the schools can discourage their

students from similarly giving effect to equally irrational and invidious fears and prejudices against those who differ by race, religion, or ethnicity.

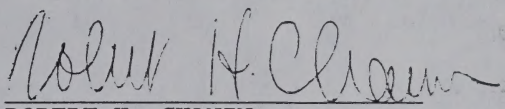
Through Amendment 2 the State officially sanctions discrimination against certain of its citizens, just as surely as did the anti-Semitic laws of Nazi Germany or the Jim Crow legislation of an earlier period in this country. It is illusory to believe that a state-created norm of intolerance, once called into existence, can be limited to its avowed object.

Amici believe that the public schools are the agency of society most essential in bringing about appreciation for diversity and respect for the rights of all. Yet it is plain that the schools will not be able to persuade students of these fundamental values if the State asserts as a matter of constitutional principle that discrimination against one particular minority group is acceptable. It is this that may be the most tragic legacy of Amendment 2.

CONCLUSION

The judgment of the District Court enjoining the implementation of Amendment 2 as contrary to the Constitution of the United States should be affirmed.

Respectfully submitted,



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Certificate of Service

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